



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2003

Ms. Beverly R. Rickhoff
Escamilla & Poneck, Inc.
100 Travis Park Plaza Building
711 Navarro
San Antonio, Texas 78205

OR2003-7962

Dear Ms. Rickhoff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190641.

The Edgewood Independent School District (the "district"), which you represent, received a request for information relating to personnel action taken against a specified district employee and the "most recent campaign finance reports of all current members of the [district] Board of Trustees." You indicate that some responsive information will be made available to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.026, 552.101, 552.102, 552.103, 552.108, and 552.114 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision and state the exceptions to disclosure that apply to the information at issue no later than the tenth business day after the date of the governmental body's receipt of the

¹ Although the district claims that portions of the remaining requested information are excepted from disclosure under section 552.026 of the Government Code, we note that section 552.026 does not constitute an exception to disclosure under the Public Information Act (the "Act"). Accordingly, we do not address your claim that portions of the remaining requested information are excepted from disclosure pursuant to section 552.026 of the Government Code.

written request for information. *See* Gov't Code § 552.301(b). You state that the district received the request for information in this matter on August 20, 2003. Therefore, the district had until September 4, 2003 to state all of the exceptions to disclosure that apply to the information at issue in this matter. However, the district did not claim that any portion of the submitted information was excepted from disclosure under sections 552.108 and 552.114 until September 11, 2003, more than ten business days after the district's receipt of the request for information. Thus, we find that the district failed to comply with section 552.301 of the Government Code with regard to asserting that portions of the submitted information are excepted from disclosure pursuant to sections 552.108 and 552.114 of the Government Code.

Because the district failed to comply with the procedural requirements of section 552.301 with regard to asserting these particular exceptions to disclosure, the information at issue is now presumed public with respect to these exceptions. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The district must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now presumed public with respect to these exceptions. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the district claims that portions of the submitted information are excepted from disclosure pursuant to section 552.108 of the Government Code, we note that section 552.108 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision No. 177 at 3 (1977) (governmental body may waive law enforcement exception). Further, we note that the district's claim under section 552.108 does not provide a compelling reason for non-disclosure under section 552.302 in this instance. *But see* Open Records Decision No. 586 at 3 (1991) (need of another governmental body to withhold information under section 552.108 can provide compelling reason for non-disclosure under section 552.302). Accordingly, we conclude that the district may not withhold any portion of the submitted information under section 552.108 of the Government Code. However, since the district claims that portions of the submitted information are excepted from disclosure pursuant to section 552.114 of the Government Code, which can provide compelling reasons for nondisclosure of requested information under section 552.302, we will address this claim.

Next, we note that a portion of the submitted information constitutes a medical record that is subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a

physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). We have marked the medical record in Exhibit C that is subject to the MPA. The district may only disclose this record in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the district must withhold this marked record in Exhibit C pursuant to the MPA.

Further, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). One of the submitted documents in Exhibit C, which we have marked, constitutes a completed report made of, for, or by the district. Several of the submitted documents in Exhibit D, which we have also marked, constitute completed evaluations made of, for, or by the district. Further, portions of the submitted information constitute documents from a completed investigation made of, for, or by the district. Thus, the district must release these documents to the requestor pursuant to section 552.022(a)(1), unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly confidential under other law.² Although the district claims that the completed report in Exhibit C and the documents from the completed investigation are excepted from disclosure under section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception to disclosure that does not constitute "other law" for the purposes

² We have already noted that the district has waived its section 552.108 claim with regard to the submitted information.

of section 552.022.³ Accordingly, we conclude that the district may not withhold any portion of this particular information under section 552.103 of the Government Code. However, since the district claims that the completed evaluations in Exhibit D are excepted from disclosure pursuant to section 552.101 of the Government Code, we will address that claim.

In addition, we note that the marked completed report is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.⁴ Chapter 261 of the Family Code is applicable to information that relates to reports and investigations of alleged or suspected child abuse or neglect. Section 261.201 provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Based on our review of the marked completed report, we find that it concerns a report and investigation of alleged or suspected abuse made under chapter 261. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). We assume that the district's police department has not adopted a policy that would allow for the release of this information in this instance. Accordingly, we conclude that the district must

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

⁴ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

withhold the marked completed report pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

You claim that the completed evaluations in Exhibit D are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word “teacher,” for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code, or a school district teaching permit under section 21.055, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We also concluded that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.* Based on your arguments and our review of these completed evaluations, we find that they constitute evaluations, as that term is commonly understood, for purposes of section 21.355. Assuming that the individual who was the subject of these evaluations is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and was engaged in the process of teaching at the time of the evaluation, we conclude that the district must withhold these marked evaluations pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

You also claim that portions of the submitted information in Exhibit D are excepted from disclosure pursuant to section 552.102(b) of the Government Code. Section 552.102(b) provides that a transcript from an institution of higher education maintained in the personnel file of a professional public school employee is excepted from disclosure pursuant to section 552.102(b), except for the information in the transcript pertaining to the degree obtained or the curriculum. *See* Gov’t Code § 552.102(b). Based on our your arguments and our review of this particular information, we conclude that the district must withhold the college transcripts contained in Exhibit D pursuant to section 552.102(b) of the Government Code, except for the information on these transcripts pertaining to the curriculum and degree obtained.

We now address your claim that the remaining submitted information in Exhibits B and C is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The district maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. To meet this burden, the district must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

You indicate that the remaining submitted information in Exhibits B and C relates to a criminal case that is pending prosecution with the Bexar County District Attorney's Office (the "district attorney"). However, it appears that the district is not a party to this pending criminal case. *See* Gov't Code § 552.103(a); *see also* Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the information at issue withheld from disclosure under section 552.103. You have not provided us with such a representation. Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information in Exhibits B and C under section 552.103 on the basis of the district attorney's pending criminal prosecution.

However, you also argue that the district reasonably anticipates civil litigation against the district in this matter. The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). In order to establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made

a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You indicate that the information at issue relates to a pending internal grievance proceeding. You state that the person who is the subject of this grievance proceeding has been represented by an attorney at all levels of the district's grievance process who has indicated to the district that he anticipates filing a Title VII claim against the district regarding this matter. After carefully consideration of your arguments and our review of the information at issue, we find, however, that you have not adequately demonstrated, nor do the submitted documents reflect, that civil litigation was reasonably anticipated by the district on the date that it received this request. Accordingly, we conclude that the district also may not withhold any portion of the remaining submitted information in Exhibits B and C under section 552.103 of the Government Code on the basis of any civil litigation that may be anticipated by the district in this matter.

In addition, you claim that Exhibit C is excepted from disclosure pursuant to section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. *See* Gov't Code § 552.114(a). Section 552.026 of the Government Code provides: "This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational and Privacy Rights Act of 1974 . . . [("FERPA")]. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution must withhold information that is protected by FERPA and excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded must withhold information that is excepted from disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. However, since the district has submitted such information to us for review, we will address your arguments under FERPA.

Information must be withheld under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). This includes information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). Based on your arguments and our review of the remaining submitted information, we find that portions of Exhibit C, as well as portions of Exhibit B, constitute personally identifiable information contained in a student's education records. Accordingly, we conclude that the district must withhold the information that we have marked within each of these exhibits pursuant to section 552.114 of the Government Code. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978).

Finally, we note that portions of the remaining submitted information in Exhibits B and C, which we have marked, may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that to the extent that the district employee with whom the marked section 552.117(a)(1) information is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold this information pursuant to section 552.117(a)(1) of the Government Code. Otherwise, the district must release this particular information to the requestor.

In summary, absent the applicability of an MPA access provision, the district must withhold the medical record that we have marked in Exhibit C pursuant to the MPA. The district must withhold the completed report that we have marked in Exhibit C pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Assuming that the individual who was the subject of the completed evaluations in Exhibit D is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and was engaged in the process of teaching at the time of the evaluation, the district must withhold the evaluations pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. The district must withhold the college transcripts contained in Exhibit D pursuant to section 552.102(b) of the Government Code, except for the information on these transcripts

pertaining to the curriculum and degree obtained. The district must withhold the information that we have marked within Exhibits B and C pursuant to section 552.114 of the Government Code. To the extent that the district employee with whom the marked section 552.117(a)(1) information in Exhibits B and C is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold this information pursuant to section 552.117(a)(1) of the Government Code. The district must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

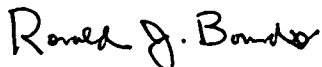
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 190641

Enc. Marked documents

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